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No. 86-1892

In the Supreme Court of the United States

OCTOBER TERM, 1987

FORD MOTOR COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The Brief in Opposition offers no answer to the legal arguments set forth in the Petition, in which we showed that the court of appeals' decision deprives companies such as Ford of *any* opportunity, in *any* court, to obtain a binding determination of the validity of a state SIP and that this inequitable result conflicts with the decisions of other circuits. Instead, the Opposition presents a melange of erroneous characterizations of the record (see App. 1, *infra*, 1a-3a), incorrect assertions about the impact of our position on Clean Air Act enforcement, and unseemly and unsupported suggestions of "collusion" between Ford and Michigan state environmental officials. EPA's effort to obscure the fundamental issues of federalism and due process presented by the Petition should not be permitted to succeed.

1. The Conflict In The Circuits. EPA is unable to offer any tenable distinction between the decision below and that of the Seventh Circuit in *Sierra Club* v. *Indiana-Kentucky Electric Corp.*, 716 F.2d 1145 (1983). The Agency therefore is forced merely to parrot the Sixth Circuit's assertion that *Sierra Club* should be limited to state SIPs invalidated on state *procedural* grounds. See Br. in Opp. 16-18. But EPA fails to explain why there is any conceivable logic to the procedural-substantive distinction, nor does it offer any rationale for treating procedural flaws as having greater significance than substantive flaws. See Pet. 17-18. There is, of course, no such reason. As we explained in the Petition (at 16-20), the common denominator in *Sierra Club* and this case is that both SIPs were held by state courts to have been fundamentally flawed from their inception. It is that fact that places the two decisions in conflict, thereby necessitating an authoritative resolution by this Court.

2. The Deprivation Of Judicial Review. The Brief in Opposition also makes no effort to dispute our contention (Pet. 24-27) that the court of appeals' decision deprives Ford of any judicial forum in which to obtain a binding resolution of its challenge to the technological and eco-

nomic feasibility of the state SIP. Notwithstanding this Court's decision in *Union Electric Co.* v. *EPA*, 427 U.S. 246 (1976), teaching that the state courts are the exclusive judicial forum for such challenges, EPA would deprive companies such as Ford of any meaningful opportunity for state court review by telling them that they should be satisfied if, after successfully challenging a state SIP on feasibility grounds, the state court judgment is treated as nothing more than the " 'first step in the [SIP] revision process' " (Br. in Opp. 16 (citation omitted)). And by studiously avoiding the promulgation of its own federal SIP which would be subject to challenge in federal court, EPA has cut off Ford's only other avenue for judicial review.

Thus, EPA simply refuses to come to grips with the basic inequity of its position and the fundamental denial of due process that inevitably results from that position. EPA does not contend that Ford or any other source could ever have complied with Rule 610, nor does it contend that the State would have promulgated the rule if it had been aware at the outset of its infeasibility. Yet EPA insists on enforcing that rule even after the state court has declared it invalid on feasibility grounds. It is simply no answer to say that Ford's due process rights are satisfied by allowing it to plead for the imposition of lesser penalties in the case of a state SIP that has been invalid since its inception.

EPA's only proposed "solution" to Ford's dilemma is to suggest that it should have brought suit to force EPA to conclude its consideration of the proposed SIP revision more promptly. Br. in Opp. 15 n.14. Yet if Ford ever did file such a suit, EPA undoubtedly would say that it is engaged in a "continuing dialogue" with state authorities and is acting "expeditiously in light of the important public rights involved." *Ibid.* Of course, each day of this seemingly interminable "continuing dialogue" could cost Ford up to $25,000 per vinyl coating line, and that dialogue, even if ultimately successful, might not avoid penalties for alleged violations during the years EPA has been

considering the proposed revision. Cf. *United States* v. *National Steel Corp.*, 767 F.2d 1176, 1182 n.1 (6th Cir. 1985).

3. The State Court Judgment Controls. EPA's position also virtually eradicates any meaningful role for the states in the federal-state partnership created by the Clean Air Act. EPA's entire argument depends on its insistence that the issue in this case is whether proposed SIP *revisions* must be approved by EPA before they may become effective. But the SIP revision process is wholly irrelevant to the actual question presented: May a federal administrative agency override the decision of a state court adjudicating the validity or invalidity of the *adoption* of a state SIP? As to *that* issue, which is an inevitable consequence of this Court's decision in *Union Electric*, EPA simply fails to offer any plausible reason to support the denial of certiorari.[1]

Although federal law establishes minimum requirements that states must adopt, state SIPs are nevertheless creatures of state law. They are promulgated by state legislatures or state administrative agencies, and they have the force and effect of state statutes and regulations. Not surprisingly, therefore, nothing in either the language of the Clean Air Act or its legislative history suggests that EPA's approval of a state SIP does anything more than make it federally *enforceable*; EPA's approval does not transform state law into some sort of "born again" federal law, the validity of which must thereafter be decided according to federal law. Indeed, EPA has never contended that its approval of a state SIP transmutes that provision into federal substantive law.

Against this background, EPA does not explain why it is that state court judgments adjudicating the validity

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[1] EPA's reliance (Br. in Opp. 9) on 42 U.S.C. § 7410(i) begs the question. That section, prohibiting modification of SIP requirements except through the revision process, is relevant only in the case of "applicable" plans, and the "applicability" of the Michigan SIP is the very issue in this case.

or invalidity of a state law—the state SIP—may be disregarded by EPA unless and until EPA decides to "ratify" the state court's judgment. EPA does not sit as a reviewing court authorized to affirm or reverse the judgments of state courts. Clearly, any such role for a federal administrative agency would work a radical intrusion on state sovereignty.[2] Absent a clear indication that Congress actually intended to permit a federal administrative agency to so interfere with the workings of state legal systems, it is plain that a state court judgment declaring a provision of state law to be invalid is wholly authoritative.[3]

4. The Federal SIP Route Available To EPA. It is EPA's position, not Ford's, that would work a radical

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[2] There are two entirely separate aspects to the state court judgment. First, the state court ruled that Rule 610 was void from its inception because it was adopted in the belief that it represented RACT when it fact it never did. Validity under state law is an issue as to which only the state courts may speak. The second, and wholly distinct, aspect of the state court's judgment was its ratification of the State's proposal to submit a SIP revision containing new limits to EPA for federal approval. See Pet. 19 n.5. We do not contend that the new limits are binding on EPA until it approves them. The result is that, if EPA relies on a state SIP (rather than promulgating a federal SIP), there is no federally enforceable SIP in place between the time of a state court adjudication of invalidity and EPA's approval of a new SIP. But the length of that period of time is entirely within *EPA*'s control (see Pet. 21; page 5, *infra*). In addition, the source remains subject to any applicable state standard, such as the revised emission limits applicable to Ford's Mount Clemens plant by virtue of the Michigan Air Pollution Control Commission's February 1, 1985 adoption of the the parties' Consent Order. See Pet. App. 26a-32a.

[3] Contrary to EPA's apparent contention (Br. in Opp. 14), our position does not depend upon EPA's being "bound" by the state court judgment in the collateral estoppel sense, nor does it depend upon the state court's being aware of the collateral consequences of its judgment. Instead, it turns on the state SIP's having been declared void from its inception because it never represented RACT. As explained above, there is no justification for permitting EPA to collaterally attack the validity of the state court's ruling as to that issue.

restructuring of the Clean Air Act. Congress explicitly authorized EPA to promulgate a federal SIP as *federal* substantive law, in accordance with procedures mandated by the Administrative Procedure Act, whenever a state fails in its responsibility to promulgate a valid SIP under *state* law. 42 U.S.C. § 7410(c). Thus, when Congress wanted to give EPA the power to create federal law (in contradistinction to federally enforceable state law), it knew exactly how to do it.[4] That EPA has chosen, for whatever reason, not to exercise the express mechanism for the creation of federal law built into the Clean Air Act is no justification for granting it "license to circumnavigate the statutory scheme" (Br. in Opp. 19) by arrogating unto itself the authority to determine the validity or invalidity of state law.[5]

5. The Irrelevance Of "Technology-Forcing." There is also no merit to EPA's contention that acceptance of our position would cause the Clean Air Act's "elaborate technology forcing provisions * * * [to] lose all practical

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[4] A familiar example of Congress's decision to transform state law into federal substantive law is found in the Assimilative Crimes Act, 18 U.S.C. § 13. Prosecutions under that statute are not for the enforcement of state laws, but for the enforcement of federal law assimilating state statutes. See, *e.g.*, *United States* v. *Brown*, 608 F.2d 551, 553 (5th Cir. 1980). Importantly, however, federal courts applying such assimilated state law are bound by state courts' interpretation of their own laws. See, *e.g.*, *United States* v. *Best*, 573 F.2d 1095, 1098-1099 (9th Cir. 1978). See also Note, *The Federal Assimilative Crimes Act*, 70 Harv. L. Rev. 685, 696 (1957) (concluding that "Congress intended to adopt not only the state criminal statutes but also the state courts' interpretation of those statutes").

[5] There is thus no merit to EPA's assertion (Br. in Opp. 14 n.13) that "the Clean Air Act's express provision for a SIP revision process overrides principles of comity." The fact is that it is *Congress* that has decided that federal enforcement depends upon the existence of *either* a valid state SIP *or* a federal substitute promulgated by EPA. Having elected not to follow the federal route, EPA cannot be heard to argue that the state court judgment should be treated as if it had never been entered.

meaning." Br. in Opp. 12.[6] EPA elsewhere acknowledges that RACT is the applicable standard for Ford's Mount Clemens plant. *Id.* at 13 n.12. Thus, EPA's emphasis on "technology-forcing" considerations serves only to obfuscate the critical and undisputed fact that the State never would have promulgated Rule 610 had it known from the outset that the rule was not achievable "by the application of control technology that is reasonably available *considering technological and economic feasibility.*" 45 Fed. Reg. 59331 (1980) (emphasis added) (footnote omitted) (EPA definition of RACT).[7]

6. Nothing Turns On The Issue Of Consent. Despite EPA's suggestions to the contrary,[8] it is impossible to

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[6] Indeed, in the context of this case, it is highly misleading for EPA to assert that the Act's requirements " 'are expressly designed to force regulated sources to develop pollution control devices that might at the time appear to be economically or technologically infeasible' " (Br. in Opp. 9 (quoting *Union Electric Co.*, 427 U.S. at 257)). EPA's reliance on the "technology-forcing" nature of the Clean Air Act has absolutely no relevance to this litigation.

The technological standard at issue in this case is "RACT"—reasonably available control technology. As we explained in the Petition (at 4, 27), RACT, by definition, is *not* a technology-forcing standard. Technology-forcing standards are found in other sections of the Clean Air Act, such as the new source performance standards. See 42 U.S.C. § 7475(a)(4) ("best available control technology"); 42 U.S.C. § 7503(2) ("lowest achievable emission rate").

[7] Equally beside the point is EPA's observation (see Br. in Opp. 19) that nothing in Michigan law would have prevented the State from choosing to impose a standard more stringent than RACT. It is undisputed on this record that the State intended Rule 610 to represent no more and no less than RACT, and this Court has made it plain that EPA has no authority to question the wisdom of that choice. *Train* v. *NRDC*, 421 U.S. 60, 79 (1975).

[8] By repeatedly stressing that the state court's judgment invalidating Rule 610 was entered on consent, EPA comes perilously close to suggesting that the State of Michigan—including its judicial system—violated its obligations to the public. Although it stops just shy of accusing the State and Ford of collusion, EPA repeatedly suggests that states and their courts are not to be

conclude on this record that the state court's judgment should be given any less controlling effect than would be accorded a judgment that had been fully "litigated." Far from suggesting any improper "deal" between Ford and the State, the record shows that the reason for the State's agreement to the consent judgment was to rectify the fundamental flaw inherent in Rule 610 as originally adopted—a flaw that came about because both Ford and Michigan were misled by a defective EPA technical guidance document.[9]

The State's attorney told his client that he had no viable defense to Ford's state court action because his own witnesses had reached the same conclusion as Ford—*i.e.*, Rule 610 never was achievable through the use of RACT technology. The State's attorney explained that

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trusted, lest they succumb to their "possible inclination * * * to give unduly favorable treatment to local industries." Br. in Opp. 12. See also *id.* at 11, 14, 18-19. There is also a suggestion (*id.* at 14) that state court judges may be willing to sign whatever document is placed before them. EPA's thinly veiled attacks on the integrity of the State are, to say the least, unseemly, and they find not the slightest support in the record of this case.

[9] Rule 610 was based on EPA's Control Technology Guidance (CTG) document for vinyl coatings. The Agency's CTGs were hastily prepared in the period immediately after passage of the 1977 Amendments to the Clean Air Act and without any formal public notice or comment. The vinyl coating CTG assumed that RACT technology would capture 90% of the solvent applied and remove 90% of what was captured, thereby achieving an emission reduction of 81%. Pet. App. 43a.

The CTG's removal efficiency estimate was basically correct, but the capture efficiency estimate was wildly incorrect. Pet. App. 46a-48a. Actual test data show that capture efficiency of an estimated 60% is optimum for the state-of-the-art control equipment installed by Ford. *Id.* at 48a. Even under EPA's standards, there was no other technically and economically feasible alternative for Ford's facility. *Id.* at 49a-50a. Accordingly, the Michigan Air Pollution Control Commission found that, notwithstanding its belief that it was adopting a RACT standard when it first approved Rule 610, the rule was never one that could have been achieved by RACT technology. *Id.* at 27a-28a, 61a-62a.

"all of the people that I would look to as witnesses to defend your rule are people who are here recommending to you that the rule be changed." Pet. App. 60a. EPA's suggestion that there should nevertheless have been a full trial therefore amounts to a contention that the State should have been required to mount a sham defense in the state court action. Clearly, nothing in this case (and nothing in the Sixth Circuit's decision) turns on whether the state court acted "after trial" or "on consent."

CONCLUSION

There is no avoiding the basic federalism and due process issues raised by the petition. The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDICES

APPENDIX 1

SUMMARY OF MISLEADING AND UNSUPPORTED ASSERTIONS IN THE GOVERNMENT'S BRIEF

(1) EPA repeatedly asserts (Br. in Opp. 5, 14, 15 n.13) that it was not a party to the state court action. EPA avoids mentioning that its counsel conceded at oral argument before the court of appeals that EPA was not a necessary party to the state court action. See App. 2, *infra*, 4a.

(2) EPA places heavy stress on the "technology-forcing" nature of the Clean Air Act's requirements. See, *e.g.*, Br. in Opp. 9, 12. Those requirements have nothing to do with the RACT-based standard applicable in this case. See pages 5-6 and note 6, *supra*.

(3) EPA charges Ford with dilatory tactics for operating six of the eight vinyl coating lines at the Mount Clemens plant without pollution controls beyond the initial deadline for compliance with Rule 610. Br. in Opp. 15-16 n.14. Ford and the State agreed in 1982 on a plan that permitted Ford to achieve compliance with the equivalent of the emission limitation contained in Rule 610 through use of a "bubble" concept, whereby state-of-the-art technology would be installed on two of the plant's eight coating lines (at a cost of $3 million) and major additional reductions would be obtained on the remaining vinyl coating lines by the introduction of the "embossed last" process that reduced the number of coating applications from three to two (at a cost of an additional $3 million). Pet. App. 44a-45a. By these efforts, Ford reduced *total* VOC emissions from its Mount Clemens plant to a level well below that sought to be achieved by Rule 610 as construed by EPA. See Pet. 8, 21 n.7. EPA continues this action based on violations of the *rate* of emissions allegedly allowed by Rule 610. Contrary to EPA's claim (Br. in Opp. 4-5 n.5), Ford does not concede that it violated Rule 610, because it does not agree that EPA has correctly interpreted the methodol-

ogy for calculating the emission rates contained in the old rule. See Pet. App. 42a.

(4) EPA states (Br. in Opp. 3) that "petitioner urged approval [of Rule 610], providing technical data in support of its recommendation." See also *id.* at n.3. Ford was misled by the erroneous analysis contained in EPA's Control Technology Guidance document for vinyl coatings. See page 7 note 9, *supra.*

(5) EPA observes (Br. in Opp. 4 n.3) that Rule 610 was "not as stringent as limitations recommended by EPA and placed on vinyl coaters in other states." EPA excused the Chrysler Plastic Products Corporation from installing *any* VOC emission control devices and, in approving the Ohio SIP, subjected that company to a less stringent standard of 4.8 pounds of VOC per gallon of coating applied. See 48 Fed. Reg. 31202 (1983). EPA also granted Chrysler an extension of compliance dates to August 1, 1987 and December 31, 1987 under the Ohio SIP. *Ibid.*

(6) EPA disputes (Br. in Opp. 4 n.4) Ford's statement (Pet. 7, 20 n.6) that EPA did not notify the State prior to the filing of its enforcement action against Ford. The State's attorney testified at the hearing before the Michigan Air Pollution Control Commission that the State was not consulted prior to EPA's commencement of suit against Ford (Pet. App. 61a), and EPA does not contend that it issued notice of the action (required by 42 U.S.C. § 7413(b)) prior to suit. The April 19, 1984 Notice of Violation to which EPA refers (required by 42 U.S.C. § 7413(a)(1)) is not the same thing.

(7) EPA contends that the state court judgment was not intended to affect federal enforcement because "nothing in the judgment or the supporting documents indicates that the parties expected to preclude federal enforcement of Rule 610." Br. in Opp. 14. The State's attorney warned the Michigan Air Pollution Control Commission that, by admitting it made a mistake, it could expect "un-

friendly reaction" from EPA because the "United States in effect is trying to enforce your rule in federal court" (Pet. App. 60a-61a). That express warning and statement of the parties' intent *was* included in the supporting documents submitted to the state court.

(8) EPA accuses Ford of misciting *Union Electric* by failing to explain the Agency's statutory authority to ensure that state SIPs meet the Clean Air Act's *minimum* requirements, including the RACT requirement. Br. in Opp. 13 n.13. Ford explained EPA's authority in *exactly* the same terms as does EPA. See Pet. 5 & n.2.

(9) EPA states that "[p]etitioner itself composed the consent judgment's language" (Br. in Opp. 14). Neither the citation proffered by EPA (Pet. App. 22a) nor anything else in the record supports EPA's contention that Ford, rather than Ford and the State jointly, drafted the consent judgment. See Pet. App. 59a-61a.

APPENDIX 2

United States v. Ford Motor Co., No. 85-1945 (6th Cir.)

Transcript of Oral Argument Before the United States Court of Appeals for the Sixth Circuit

December 8, 1986

Before ENGEL, EDWARDS AND JONES, Circuit Judges.

JUDGE ENGEL: Mr. Lazarus.

MR. LAZARUS: Good morning, Your Honor. May it please the Court, I represent the United States on behalf of the Environmental Protection Agency.

* * * * *

JUDGE ENGEL: Could Ford have properly brought this action in the state court had not the instant action already been pending?

MR. LAZARUS: Oh, absolutely—Ford could have brought the ac-- Ford could have brought the action if Ford had believed that the Rule 610 was technologically and economically infeasible. Ford could have brought that action long prior to the federal action.

JUDGE ENGEL: So, so then it has a substantive right to make that kind of challenge—the kind that it did in the—in the state court.

MR. LAZARUS: That's correct.

JUDGE ENGEL: Would EPA have been a necessary party to that proceeding?

MR. LAZARUS: No. EPA would not have been a necessary party to the proceeding.